

# Enforcement Options and Paths to Compliance: Disputants and Global Stakeholders in *Philippines v. China*<sup>1</sup>

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## Abstract

The *Philippines v. China* arbitration award has been praised as a landmark victory setting forth illuminating jurisprudence interpreting the UN Convention on the Law of the Sea [UNCLOS], but it has also been repeatedly excoriated as an “unenforceable” decision—a Pyrrhic victory—due to China’s repeated refusal to date to acknowledge the binding effect of the award. China’s withdrawal from Scarborough Shoal—hailed by the new Duterte government as a hallmark of its diplomatic efforts—is one instance of state practice that still remains equivocal on the *opinio juris* of China’s acceptance (or rejection) of the arbitration award.

This paper disambiguates the concept of “enforcement” in international law (as a matter of authorized coercion in the Kelsenian sense), from that of “compliance” (which implicates a spectrum of political options for states and non-state actors). Because the *Philippines v. China* Arbitration Award is also a source of international law (albeit a subsidiary one), the enforcement of this Award requires that all states adhere to their continuing obligations under the law of state responsibility not to recognize or support any of the unlawful situations or illegal acts identified in this Arbitration Award, particularly those involving destruction of the marine environment in the high seas of the South China Sea from land building activities; any state-sanctioned or state-supported uses of force against Philippine fishermen, or hydrocarbon exploration activities in the Philippines’ exclusive economic zone [EEZ];

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<sup>1</sup> This paper is based on remarks given at the International Law Association’s Panel on Disputes in the South and East China Seas, during the Fall 2016 International Law Weekend, Fordham Law School, and a follow-up lecture in February 2017 at Stanford Law School’s Center for International Conflict Negotiation. My thanks go to panel moderator and chair Professor Ved Nanda, and fellow panelists Professors Jerome Cohen and Suisheng Zhao, and likewise to Stanford Law School Professor Allen Weiner for robust exchanges on this topic.

and state law enforcement activities that create serious risks of collisions at sea, among others. I argue that while the *Philippines v. China* Arbitral Award does not (and never intended to) resolve maritime delimitation between South China Sea disputing claimants, all disputants and global stakeholders can internalize the award in various compliance paths—from the conclusion of the long overdue ASEAN-China Code of Conduct for Parties to the South China Sea, to the formulation of various provisional arrangements under UNCLOS Articles 74(3) and 83(3) to achieve co-operation on marine resource and fisheries management and set possible provisional boundaries pending delimitation, as well as mutual restraint arrangements [MRAs] to ensure safety and good order at sea between all disputants.

When, however, issues of international law involve relative power positions, especially if relations are not precisely reciprocal, good faith, self-interest, custom, and national enforcement have not been effective sanctions ... National political authorities usually place considerations of national security in the particular situation ahead of international obligations ... In international law, as in other kinds of law, genuine sanctions must proceed from the authority of the legal community superior to both litigants, and must be supported by the force of that community ...<sup>2</sup>

Most frequently the real problem is not in arriving at an answer in law, but in enforcing an answer in law ... Law comprises not only the verbal pronouncements of authoritative organs, but also the established patterns of behavior of the individuals composing society ...<sup>3</sup>

External power, therefore, supported by the general consent of the family of nations, and assisted by such reverence for law as may be found among its members, is the instrument by which the law of nations is enforced.<sup>4</sup>

## I. ENFORCEMENT VIS-À-VIS COMPLIANCE

Enforcement of an international decision is not automatically synonymous with a state's compliance with that decision. Enforcement refers to the “transformation, by community means, of authoritative pronouncement into controlling reality ... Securing enforcement of a particular decision in the international arena depends ultimately upon the ingenuity, resourcefulness, and energy of the winning party”.<sup>5</sup> It is the victorious party that actively seeks to enforce an international decision upon the offending state, not only to vindicate its rights but also to obtain redress and avoid further harm or injury caused by the internationally wrongful acts of that state.<sup>6</sup>

Compliance with an international decision, on the other hand, refers to a “state of conformity or identity between an actor's behavior and a specified rule ... [which] is

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2. Quincy WRIGHT and Edward WARNER, “Enforcement of International Law” 38 Proceedings of the American Society of International Law (1921–1969) 77 at 78.
  3. W. Michael REISMAN, “The Enforcement of International Judgments” (1969) 63 American Journal of International Law 1 at 1.
  4. Ronald F. ROXBURGH, “The Sanction of International Law” (1920) 14 American Journal of International Law 26 at 30.
  5. Reisman, *supra* note 3 at 6, 23.
  6. See Math NOORTMAN, *Enforcing International Law: From Self-Help to Self-Contained Regimes* (Abingdon: Routledge, 2016) at chapter 7 (on enforcement of judicial decisions).

agnostic about causality ... most theories of compliance with international law are at bottom theories of the behavioral influence of legal rules”.<sup>7</sup> Realist, institutionalist, and normative theories abound in international relations, political science, and international law scholarship to explain why, when, and in what circumstances states comply with their international obligations.<sup>8</sup> Ultimately, whether a state complies with an international decision does not wholly depend on the efforts of the victorious injured party seeking enforcement, but from a range of factors that succeed in engaging the state’s self-interests, such as: (1) objectives of strategic co-operation and concern for international reciprocity; (2) internal and external reputational concerns; (3) its sense of identity with shared acceptable norms of international behaviour; or (4) the state’s sense of legitimacy and fairness.<sup>9</sup> When the victorious injured party seeks to enforce an international decision against the offending state, it seeks to have that state implement the terms of the specific *dispositif* of the international decision.<sup>10</sup> When a state ultimately complies with an international decision, however, it does so generally in the absence of official international machinery or world government that centrally guarantees the implementation of international decisions.<sup>11</sup>

Determining how a state complies with an international judicial or arbitral decision is thus hardly a simple or unequivocal exercise. The political acts required to give effect to the decision may result in a state’s compliance being not just a matter of degree, but also of timing.<sup>12</sup>

[T]here is considerable variation in the degree to which states comply with international law ... [which] seems to cut across issue areas ... much depends on the type of reputation state elites hope to establish—both vis-à-vis the international community and their national counterparts as well as in relation to the domestic society. A desire for a reputation for “playing by the rules” will both direct and constrain state behavior. However, if compliance risks provoking discontent at home, what seems to matter most is the head of state’s “executive tenacity”. Naturally, autocrats can act with far more freedom than democratically elected leaders, but this means they will always ignore public opinion. Conversely, if the state elites are more interested in developing a reputation for irascibility, this must be weighed against domestic expectations and it is possible that the politically

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7. Kal RAUSTIALA and Anne-Marie SLAUGHTER, “International Law, International Relations, and Compliance” in Walter CARLSNAES, Thomas RISSE, and Beth A. SIMMONS, eds., *Handbook of International Relations* (Thousand Oaks, CA: Sage Publishing, 2002), 538 at 539.
  8. Markus BURGSTALLER, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff, 2005) at 95–102.
  9. See Jana VON STEIN, “International Law: Understanding Compliance and Enforcement” in Robert A. DENEMARK, ed., *The International Studies Encyclopedia* (Hoboken, NJ: Wiley, 2010).
  10. See Oscar SCHACHTER, “The Enforcement of International Judicial and Arbitral Decisions” (1960) 54 *American Journal of International Law* 1 at 6–17 (on different methods of enforcement by the successful party, such as diplomatic and economic pressures, the attachment of property belonging to the debtor state, enforcement through municipal courts, and use of armed force in very limited circumscribed situations under the UN Charter).
  11. Joseph Sinde WARIOBA, “Monitoring Compliance with and Enforcement of Binding Decisions of International Courts” in J.A. FROWEIN and R. WOLFRUM, eds., *Max Planck Yearbook of United Nations Law* (The Hague: Kluwer Law International, 2001), 41 at 49; see also Attila TANZI, “Problems of Enforcement of Decisions of the International Court of Justice” (1995) 6 *European Journal of International Law* 539.
  12. See Carlo FORELLE, *International Law as a Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012) at 334–54, 336–7.

vulnerable leader will opt to comply in the face of public support for the rule despite his initial inclinations. All of this occurs against a backdrop of economic incentives and governing capacity, of course.<sup>13</sup>

Noting these threshold nuances between the enforcement of an international decision against a responsible state, and the responsible state's ultimate compliance with the international decision, how should one analyze the People's Republic of China's rejection<sup>14</sup> of the ruling of an UNCLOS Annex VII tribunal in *Philippines v. China*?<sup>15</sup> What does it mean for the Philippines, as the successful litigant, to "seek enforcement"<sup>16</sup> of this Arbitral Award in a case initiated long before the current Duterte administration's foreign policy shift "aligning"<sup>17</sup> with China, and announcing the "setting aside"<sup>18</sup> of the Arbitration Award? Conversely, are there any feasible paths for China to eventually comply with this Arbitral Award,<sup>19</sup> despite its public objections<sup>20</sup> to the lawful authority and jurisdiction of the Arbitral Tribunal that issued this Award? Or should contemporary political developments and evolving foreign policies between the Philippines, China, and other interested parties in the South China Sea<sup>21</sup> be read as

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13. Kendall STILE, *State Responses to International Law* (Abingdon: Routledge, 2015) at 3–4.
  14. Tom PHILLIPS, Oliver HOLMES, and Owen BOWCOTT, "Beijing Rejects Tribunal's Ruling South China Sea Case" *The Guardian* (12 July 2016), online: The Guardian <<https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>>; SHI Jiangtao and JUN Mai, "China's Xi Jinping Rejects Any Action Based on International Court's South China Sea Ruling" *South China Morning Post* (12 July 2016), online: South China Morning Post <<http://www.scmp.com/news/china/diplomacy-defence/article/1988990/chinas-xi-jinping-rejects-any-action-based>>.
  15. *In the Matter of the South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award [2016] Permanent Court of Arbitration Case No. 2013-19, 12 July 2016 [*Philippines v. China Award of 12 July 2016*].
  16. Antonio T. CARPIO, "How the Philippines Can Enforce the South China Sea Verdict" *The Wall Street Journal* (17 July 2016), online: The Wall Street Journal <<https://www.wsj.com/articles/how-the-philippines-can-enforce-the-south-china-sea-verdict-1468774415>>.
  17. Katie HUNT, Matt RIVERS, and Catherine E. SCHOICHT, "In China, Duterte Announces Split with the US: 'America Has Lost'" *CNN* (20 October 2016), online: CNN <<http://www.cnn.com/2016/10/20/asia/china-philippines-duterte-visit/>>; Ben BLANCHARD, "Duterte Aligns Philippines with China, Says U.S. Has Lost" *Reuters* (20 October 2016), online: Reuters <<http://www.reuters.com/article/us-china-philippines-idUSKCN12K0AS>>.
  18. Nestor CORRALES, "Duterte Says He'll 'Set Aside' Arbitral Ruling on the South China Sea" *Philippine Daily Inquirer* (17 December 2016), online: Philippine Daily Inquirer <<http://globalnation.inquirer.net/150814/duterte-says-hell-set-aside-arbitral-ruling-on-south-china-sea>>.
  19. I note that other scholars have characterized subsequent developments as proof of China's imperfect compliance and/or outright non-compliance with *Philippines v. China*. See Julian KU and Chris MIRASOLA, "Tracking Compliance with the South China Sea Arbitral Award: China's 2017 Summer Fishing Moratorium May Rekindle Conflict with the Philippines" *Lawfare* (7 March 2017), online: Lawfare <<https://www.lawfareblog.com/tracking-compliance-south-china-sea-arbitral-award-chinas-2017-summer-fishing-moratorium-may>>.
  20. See "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" *Foreign Ministry of the People's Republic of China* (7 December 2014), online: Foreign Ministry of the People's Republic of China <[http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)>.
  21. For a summary of legal positions as well as empirically documented developments among claimants and interested parties in the South China Sea, see, among others, Christopher D. YUNG and Patrick MCNULTY, "An Empirical Analysis of Claimant Tactics in the South China Sea" *INSS Strategic Forum* (August 2015), online: INSS Strategic Forum <<http://ndupress.ndu.edu/Portals/68/Documents/stratforum/SF-289.pdf>>; Island Tracker features in the Asian Maritime Transparency Initiative [AMTI] which documents and maps China's land reclamation and island building activities, online <<https://amti.csis.org/island-tracker/>>; and Lowell BAUTISTA and Aries A. ARUGAY, "Philippines v. China, The South

evidence of the desuetude<sup>22</sup> of the customary principles and treaty norms articulated in the *Philippines v. China* Arbitral Award?

Before examining the enforcement options of the Philippines vis-à-vis other paths to compliance with the *Philippines v. China* Arbitral Award, I will first clarify the *dispositif* of the Arbitral Award and what conduct it requires, if any, from the two states in this case. Noting that the *Philippines v. China* Award is a subsidiary source of international law<sup>23</sup> as well as a binding<sup>24</sup> arbitral award directly affecting the parties to this case, I will then differentiate between the Philippines' enforcement options, China's paths to compliance, and the possible shared interests of other states in China's ultimate compliance with the *Philippines v. China* Award.

## II. THE *DISPOSITIF* ON THE MERITS OF THE *PHILIPPINES V. CHINA* ARBITRAL AWARD

The *Philippines v. China* Arbitral Award lays down the Tribunal's declaratory judgment over various legal and interrelated factual questions. In its Award on Jurisdiction and Admissibility,<sup>25</sup> the Tribunal held that: (1) it was properly constituted pursuant to Annex VII of UNCLOS; (2) China's non-appearance did not deprive the Tribunal of its jurisdiction; (3) the Philippines did not commit an abuse of process in initiating the arbitration; and (4) the Tribunal would consider seven of the Philippines' submissions on the merits, subject to conditions indicated by the Tribunal in its Award on Jurisdiction and Admissibility.<sup>26</sup> The *dispositif* on the merits of the Arbitral Award on the merits set out the Tribunal's sixteen declaratory findings. These could be divided into three broad areas: (1) the inconsistency of China's "nine-dash line map" with UNCLOS maritime entitlement limits;<sup>27</sup> (2) the characterization of various geographical features as features within the meaning of UNCLOS Article 121(1) and low-tide elevations within the meaning of UNCLOS Article 13,<sup>28</sup> rocks under UNCLOS Article 121(3),<sup>29</sup> or other high-tide features,<sup>30</sup> and the legal consequences of

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China Sea Arbitral Award: Implications for Policy and Practice" (2017) 9 Asian Politics & Policy 1 at 122–52.

22. See Mark E. VILLIGER, *Customary International Law and Treaties* (Leiden: Martinus Nijhoff, 1985) at 32–3.
23. See Diane A. DESIERTO, "The Philippines v. China Arbitral Award on the Merits as a Subsidiary Source of International Law" *EJIL:Talk!* (12 July 2016), online: EJIL:Talk! <<http://www.ejiltalk.org/the-philippines-v-china-arbitral-award-on-the-merits-as-a-subsidiary-source-of-international-law/>>.
24. *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N.T.S. 11833 (entered into force 16 November 1994) [UNCLOS], at art. 296 (Finality and Binding Force of Decisions), and Annex VII, art. 11 (Finality of Award).
25. *In the Matter of an Arbitration Before an Arbitral Tribunal Constituted Under Annex VII to the United Nations Convention on the Law of the Sea, The Republic of the Philippines v. The People's Republic of China*, Award on Jurisdiction and Admissibility [2015] Permanent Court of Arbitration Case No. 2013-19, 29 October 2015 [*Award on Jurisdiction and Admissibility*].
26. Award on Jurisdiction and Admissibility, *ibid.*, at para. 413.
27. *Philippines v. China* Award of 12 July 2016, *supra* note 15 at para. 1203(B)(1) and (2).
28. *Ibid.*, at para. 1203(B)(3).
29. *Ibid.*, at para. 1203(B)(6).
30. *Ibid.*, at para. 1203(B)(7).

each characterization;<sup>31</sup> and (3) China's multiple breaches of UNCLOS obligations as a result of various activities, such as the implementation of a fishing moratorium in the South China Sea,<sup>32</sup> prevention of traditional Philippine fishing activities at Scarborough Shoal,<sup>33</sup> the destruction of the South China Sea coral reef ecosystem due to the harvesting of giant clams,<sup>34</sup> the construction of artificial islands, installations, and structures in the South China Sea,<sup>35</sup> the conduct of Chinese law enforcement vessels in Scarborough Shoal,<sup>36</sup> and the aggravation of the dispute due to China's land reclamation and island-building activities.<sup>37</sup>

As may be seen from the above enumeration, the Arbitral Tribunal in *Philippines v. China* confined its award on the merits to declaratory relief. Declaratory judgments, such as the *Philippines v. China* Arbitral Award of 12 July 2016, ultimately ensure the "recognition of a situation at law, once and for all and with binding force between the parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned".<sup>38</sup> Declaratory judgments in international law are significant, in that they also assist with how international tribunals discharge their "preventive functions", through the adjudication of disputes "before either party has acted on his own assumption as to his rights and broken the *status quo*".<sup>39</sup> They may also help generate a "deterrent effect", when the judicial pronouncement of a breach "acts as a deterrent to prevent governing authorities committing the same or similar breaches".<sup>40</sup>

Most importantly, the fundamental purpose of declaratory judgments such as the *Philippines v. China* Arbitral Award of 12 July 2016 is to "clarify and stabilize the legal relations of the parties".<sup>41</sup> It is in this light that the *Philippines v. China* Arbitral Award of 12 July 2016 should be seen as an adjudication—not of the merits of a maritime delimitation dispute—but rather, of unsettled antecedent or preliminary<sup>42</sup> legal questions well short of actual maritime boundary delimitation.<sup>43</sup> The *Philippines v. China*

31. *Ibid.*, at para. 1203(B)(4) and (5).

32. *Ibid.*, *supra* note 15 at para. 1203(B)(9).

33. *Ibid.*, at para. 1203(B)(11).

34. *Ibid.*, at para. 1203(B)(12).

35. *Ibid.*, at paras. 1203(B)(13) and (14).

36. *Ibid.*, at para. 1203(B)(15).

37. *Ibid.*, at para. 1203(B)(16).

38. *Interpretation of Judgments Nos. 7 and 8 (The Chorzow Factory)*, Judgment [1927] Permanent Court of International Justice, Series A No. 13, 16 December 1927, at 20.

39. Edwin M. BORCHARD, "Declaratory Judgments in International Law" (1935) 29 *American Journal of International Law* 3 at 489.

40. Tawhida AHMED, "The EU, the ECHR and the Effective Protection of Human Rights for Individuals" in Duncan FRENCH, Matthew SAUL, and Nigel D. WHITE, eds., *International Law and Dispute Settlement: New Problems and Techniques* (London: Bloomsbury Publishing, 2010), 345 at 358.

41. Juliette MCINTYRE, "Declaratory Judgments of the International Court of Justice" in Nikos LAVRANOS, Ruth KOK, et al., eds., 2012 *Hague Yearbook of International Law* (Leiden: Brill, 2013), 107 at 109.

42. See Jonathan I. CHARNEY, "Progress in International Maritime Boundary Delimitation Law" (1994) 88 *American Journal of International Law* 227 at 234 ("... preliminary to a maritime boundary delimitation on the basis of the multistep analysis are questions of historic title, treaty obligations, common behavior and stability derived from the doctrine of *uti possidetis*").

43. I have discussed this in greater detail in, Diane A. DESIERTO, "The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the South China Sea Arbitration—Part I" *EJIL:Talk!* (29 January 2015), online: [EJIL:Talk! <http://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-](http://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-)

Arbitral Award authoritatively provides legal determinacy over the narrow questions of: (1) the compatibility of China's nine-dash line map with UNCLOS maritime limits; (2) the characterization of certain geographical features in relation to UNCLOS Article 121 and whether these features generate maritime zones; and (3) the consistency of China's law enforcement activities and island-building activities with obligations under the UNCLOS. None of these questions involve drawing or settling the final maritime boundary delimitations between any of the South China Sea claimants, noting that maritime delimitation is defined as:

[T]he process of establishing lines of spatial ambit of coastal State jurisdiction over maritime space where the legal title overlaps with that of another State ... it is an operation to be effected between two or more States, as its object is to separate overlapping areas where legal titles of coastal States compete and each State attempts to exercise spatial jurisdiction over the same maritime space ... maritime delimitation has always had an international character in the sense that it is not a unilateral act, but must be effected between a plurality of States.<sup>44</sup>

Clearly, the questions that the *Philippines v. China* Arbitral Award resolved nowhere engaged in the “task of delimitation [which] consists in resolving the overlapping claims by drawing a line of separation between the maritime areas concerned”.<sup>45</sup> Neither did the Arbitral Award implement any of the “four main steps”<sup>46</sup> in the process of maritime delimitation (e.g. identifying the relevant coasts and baselines, ascertaining whether there is a pre-existing agreement relating to the delimitation of the maritime areas, delimiting the territorial sea by applying the equidistance-special circumstances rule, and delimiting the exclusive economic zone / continental shelf by applying the equidistance-relevant circumstances rule).<sup>47</sup>

Having clarified the declaratory nature of the *Philippines v. China* Arbitral Award of 12 July 2016, the following section will differentiate between the Philippines' enforcement options and China's possible paths to compliance.

### III. THE PHILIPPINES' ENFORCEMENT OPTIONS AND CHINA'S POSSIBLE PATHS TO COMPLIANCE

UNCLOS Article 296(1) states that “[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the

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paper-on-the-south-china-sea-arbitration/>; and Diane A. DESIERTO, “The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the South China Sea Arbitration—Part II” *EJIL:Talk!* (30 January 2015), online: EJIL:Talk! <<http://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration-part-ii/>>.

44. Yoshifumi TANAKA, *Predictability and Flexibility in the Law of Maritime Delimitation* (London: Bloomsbury Publishing, 2006) at 7–8.
45. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment [2012] I.C.J. Rep. 2012, 19 November 2012, at para. 141.
46. See Jiuyong SHI, “Maritime Delimitation in the Jurisprudence of the International Court of Justice” (2010) 9 *Chinese Journal of International Law* 271, at para. 9.
47. On technical, scientific, and legal approaches to maritime boundary delimitation, see Thomas COTTIER, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge: Cambridge University Press, 2015).

parties to the dispute”.<sup>48</sup> The *Philippines v. China* Arbitral Award thus has binding force with respect to the parties, and in respect of the particular dispute.<sup>49</sup> While China’s continuing obligation to comply with the terms of the *dispositif* in the *Philippines v. China* Arbitral Award stems fundamentally from *pacta sunt servanda*,<sup>50</sup> any controversy that may arise between the Philippines and China on the interpretation or manner of implementation of the Award may be submitted by either party for decision to the same Arbitral Tribunal that issued the 12 July 2016 Award on the merits.<sup>51</sup>

The Philippines can enforce the declaratory relief granted in *Philippines v. China* by acting consistently<sup>52</sup> with the legal conclusions drawn by the Tribunal in the *dispositif*, always internalizing the Arbitral Award as the authoritative adjudication of the questions resolved in the arbitration. This can be explored in many ways. Ordinarily, under the collective security system of international law,<sup>53</sup> a state’s failure to perform obligations incumbent upon it under a judgment of the International Court of Justice [ICJ] could be referred by the affected state to the United Nations Security Council who may “make recommendations or decide upon measures to give effect to the judgment”.<sup>54</sup> In this case, involving an UNCLOS Annex VII arbitral award, however, should China escalate any of the conduct that the *Philippines v. China* Arbitral

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48. UNCLOS, *supra* note 24 at art. 296(1). UNCLOS, *supra* note 24 at Annex VII, art. 11 states that “the award shall be final and without appeal, unless the parties have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.” For different views on the scope of this “finality” of UNCLOS Annex VII arbitral awards, see Stefan TALMON, “The South China Sea Arbitration and the Finality of ‘Final’ Awards” *Journal of International Dispute Settlement* (4 January 2017), online: *Journal of International Dispute Settlement* <<https://academic.oup.com/jids/article/doi/10.1093/jilids/idw027/2802494/The-South-China-Sea-Arbitration-and-the-Finality#51359950>>, at paras. 21, 27; Robert BECKMAN, “UNCLOS Part XV and the South China Sea” in S. JAYAKUMAR, Tommy KOH, and Robert BECKMAN, eds., *The South China Sea Disputes and the Law of the Sea* (Cheltenham: Edward Elgar Publishing, 2014), 229 at 238.
49. UNCLOS, *supra* note 24 at art. 296(2).
50. See Brooks W. DALY, “Permanent Court of Arbitration” in Chiara GIORGETTI, ed., *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Leiden: Martinus Nijhoff, 2012), 37 at 47–8.
51. UNCLOS, *supra* note 24 at Annex VII, art. 12(1).
52. The Philippines’ pronouncements under the Duterte administration have not always been consistent with the Philippines’ legal positions taken in *Philippines v. China*. Philippine Foreign Minister Perfecto Yasay told the international press that “my position, which is the official position, is that the disputed part of the South China Sea has never belonged to anyone”. See Raissa ROBLES, “Duterte Plays A Dangerous Game in the South China Sea” *South China Morning Post* (27 February 2017), online: *South China Morning Post* <<http://www.scmp.com/week-asia/geopolitics/article/2073858/duterte-plays-dangerous-game-south-china-sea>>. See also Nehginpao KIPGEN, “The Philippines’ South China Sea Flip-Flop” *The Diplomat* (2 March 2017), online: *The Diplomat* <<http://thediplomat.com/2017/03/the-philippines-south-china-sea-flip-flop/>>.
53. See Jean D’ASPREMONT, “The Collective Security System and the Enforcement of International Law” in Marc WELLER, Alexia SOLOMOU, and Jake William RYLATT, eds., *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 129.
54. *Charter of the United Nations*, art. 94(2). Note that while this term remains undefined in international jurisprudence, under Security Council practice, the threshold for a “breach of the peace” has involved some serious interstate military action. See *United Nations Security Council Resolution 82* (1950), 25 June 1950 (on Korea’s complaint of aggression); *United Nations Security Council Resolution 505* (1982), 26 May 1982 (on Falklands/Malvinas invasion); *United Nations Security Council Resolution 660* (1990), 2 August 1990 (on invasion of Kuwait); and *United Nations Security Council Resolution 598* (1987), 16 January 1987 (on Iran-Iraq war). See Jeremy Matam FARRALL, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007) at 64.



Tribunal adjudged to breach various norms of UNCLOS and general international law (such as the creation of artificial islands; destruction of the marine environment; prohibited law enforcement activities that created serious risk of collisions with vessels;<sup>55</sup> and Chinese flagged vessels preventing Philippine fishermen from engaging in traditional fishing at Scarborough Shoal, among others) to a point that ripens into “breaches of the peace”,<sup>56</sup> and the Security Council fails to act on a matter involving one of its permanent members, the Philippines could, in principle, seek recourse at the United Nations General Assembly under its “Uniting for Peace” Resolution, for the General Assembly to “consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace ... to maintain or restore international peace and security”.<sup>57</sup>

Short of actual military conflict erupting in the region that imperils international peace and security, the Philippines could internalize the *Philippines v. China* Arbitral Award *dispositif* in its maritime delimitation negotiations (if any) with China;<sup>58</sup> in clearly defining the programmatic scope and framework of future lawful enforcement measures at sea rather than relying on ad hoc talks with Chinese authorities;<sup>59</sup> crafting a possible fishing rights agreement with China over Scarborough Shoal common fishing grounds;<sup>60</sup> determining the scope of development concessions in its exclusive economic zones noting the rejection of China’s historic rights and the

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55. The Philippines is reported to have sent a note verbale to China in 2017, protesting China’s development of military infrastructure and installation of anti-aircraft and anti-missile weapons on seven artificial islands that China constructed in the South China Sea. See “Philippines Issues First Protest vs China under Duterte” *PhilStar* (16 January 2017), online: PhilStar <<http://www.philstar.com/headlines/2017/01/16/1663254/philippines-issues-first-protest-vs-china-under-duterte>>; Lindsay MURDOCH, “South China Sea: Philippines Quietly Protests China’s Weaponry on Artificial Islands” *The Sydney Morning Herald* (17 January 2017), online: The Sydney Morning Herald <<http://www.smh.com.au/world/south-china-sea-philippines-quietly-protests-chinas-weaponry-on-artificial-islands-20170117-gtsw6o.html>>.
56. *Charter of the United Nations*, art. 39.
57. *United Nations General Assembly Resolution A/RES/377(V)* (“Uniting for Peace”) at para. 1.
58. See Ministry of Foreign Affairs of the People’s Republic of China, “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea” *Foreign Ministry of the People’s Republic of China* (13 July 2016), online: Foreign Ministry of the People’s Republic of China <[http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1380615.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml)>; and LIU Zhen, “China, Philippines to Set Up Negotiation Mechanism to Resolve South China Sea Disputes” *South China Morning Post* (21 October 2016), online: South China Morning Post <<http://www.scmp.com/news/china/diplomacy-defence/article/2038993/china-philippines-agree-set-negotiation-mechanism>>.
59. There are alleged reported conversations between the Philippines and China on Chinese coast guards’ enforcement activities at Scarborough Shoal. See Emily RAUHALA, “Philippines Says China Has Stopped Chasing Fishermen from Contested Shoal” *Washington Post* (28 October 2016), online: Washington Post <[https://www.washingtonpost.com/world/report-filipino-fishermen-return-to-fish-shoal-contested-with-china/2016/10/28/51d51eb4-9cb3-11e6-b4c9-391055ea9259\\_story.html?utm\\_term=.571c4e79a228](https://www.washingtonpost.com/world/report-filipino-fishermen-return-to-fish-shoal-contested-with-china/2016/10/28/51d51eb4-9cb3-11e6-b4c9-391055ea9259_story.html?utm_term=.571c4e79a228)>. Although note that China has announced a 2017 summer fishing moratorium over many parts of the South China Sea. See Julian KU and Christopher MIRASOLA, “Tracking Compliance with the South China Sea Arbitral Award: China’s 2017 Summer Fishing Moratorium May Rekindle Conflict with the Philippines” *Lawfare* (7 March 2017), online: Lawfare <<https://www.lawfareblog.com/tracking-compliance-south-china-sea-arbitral-award-chinas-2017-summer-fishing-moratorium-may>>.
60. Note that the Philippines has declared a unilateral ban on all fishing at Scarborough Shoal. See Ben BLAND, “Duterte ‘Bans’ All Fishing in the Disputed Area of South China Sea” *The Financial Times* (21 November 2016), online: The Financial Times <<https://www.ft.com/content/does9402-afd4-11e6-9c37-5787335499a0>>.

reinforcement of the UNCLOS system of maritime zones;<sup>61</sup> and in devising its internationally lawful responses to any future escalations, such as a potential Chinese air defence identification zone over the South China Sea,<sup>62</sup> any potential island-building activities extending to Scarborough Shoal,<sup>63</sup> or any dangerous military activities in the South China Sea.<sup>64</sup> Particularly with respect to the Tribunal's findings of massive marine environmental devastation from China's island-building activities,<sup>65</sup> the Philippines could propose claimants' joint monitoring of the global commons in the South China Sea (noting proposals for a Marine Peace Park<sup>66</sup> or common international marine environmental reserve<sup>67</sup>). It could also negotiate or seek other dispute settlement options with China for compensation and/or environmental remediation of the proven devastated coral reefs and destroyed ecosystems from China's island-building activities.<sup>68</sup>

China's long-term interests in forging credible global co-operation under the aegis of its "One Road, One Belt"<sup>69</sup> economic and diplomatic programme lends urgency to preserving its international reputation to fellow states with whom China seeks to create enduring strategic economic partnerships. Continued non-compliance with the *Philippines v. China* Arbitral Award may create unwanted reputational costs on China

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61. See Tim DAISS, "China, Philippines Reportedly Set to Agree on Joint South China Sea Oil Exploration" *Forbes* (18 October 2016), online: Forbes <<https://www.forbes.com/sites/timdaiss/2016/10/18/china-philippines-oil-deal-underway-in-south-china-sea-says-report/#5292dde7352>>.
  62. See Minnie CHAN, "Beijing Ready to Impose Air Defence Identification Zone in South China Sea Pending US Moves" *South China Morning Post* (1 June 2016), online: South China Morning Post <<http://www.scmp.com/news/china/article/1960954/beijing-ready-impose-air-defence-identification-zone-south-china-sea>>.
  63. See "Manila Expects China to Build on Scarborough Shoal" *South China Morning Post* (7 February 2017), online: South China Morning Post <<http://www.scmp.com/news/china/diplomacy-defence/article/2068863/manila-expects-china-build-scarborough-shoal>>.
  64. See, among others, "South China Sea: US Reports 'Unsafe Encounter' with Chinese Military Aircraft" *The Guardian* (10 February 2017), online: The Guardian <<https://www.theguardian.com/world/2017/feb/10/south-china-sea-us-navy-aircraft-encounter>>; Tom PHILLIPS, "Images Show 'Significant' Chinese Weapons Systems in South China Sea" *The Guardian* (23 November 2016), online: The Guardian <<https://www.theguardian.com/world/2016/dec/15/images-show-significant-chinese-weapons-systems-in-south-china-sea>>; Catherine WONG, "China's New Aircraft Carrier to be Based Near South China Sea, as Tensions with Washington Rise" *South China Morning Post* (1 February 2017), online: South China Morning Post <<http://www.scmp.com/news/china/diplomacy-defence/article/2067130/chinas-new-aircraft-carrier-stay-near-south-china-sea>>.
  65. *Philippines v. China Award of 12 July 2016*, *supra* note 15 at 369–98.
  66. See Trishia BILLIONES, "Carpio Suggests Turning Spratlys into 'Marine Peace Park'" *ABS-CBN News* (14 July 2016), online: ABS-CBN News <<http://news.abs-cbn.com/news/07/14/16/carpio-suggests-turning-spratlys-into-marine-peace-park>>.
  67. Paterno ESMAQUEL, "Focus: Marine Riches of South China Sea" *Rappler* (26 April 2012), online: Rappler <<http://www.rappler.com/nation/4407-eyes-on-marine-riches-of-south-china-sea>>.
  68. See Anders CORR, "China May Owe the Philippines \$177 Billion in South China Sea Rent & Damages" *Forbes* (15 July 2016), online: Forbes <<https://www.forbes.com/sites/anderscorr/2016/07/15/the-philippines-should-sue-china-for-177-billion-in-south-china-sea-rent-and-damages/#7e9a01d226a3>>; Matthew SOUTHERLAND, "China's Island-Building in the South China Sea: Damage to the Marine Environment, Implications, and International Law" *U.S.-China Economic and Security Review Commission*, Staff Research Report (12 April 2016), online: U.S.-China Economic and Security Review Commission <[https://www.uscc.gov/sites/default/files/Research/China's%20Island%20Building%20in%20the%20South%20China%20Sea\\_o.pdf](https://www.uscc.gov/sites/default/files/Research/China's%20Island%20Building%20in%20the%20South%20China%20Sea_o.pdf)>.
  69. See TIAN Jinchun, "One Belt and One Road': Connecting China and the World" *McKinsey* (July 2016), online: McKinsey <<http://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/one-belt-and-one-road-connecting-china-and-the-world>>.

or pressures from the international system. As reported recently by other scholars, China appears to be complying with some parts of the *Philippines v. China* Arbitral Award, and not yet with others.<sup>70</sup> Most importantly, the litmus test to determine whether China will completely, continuously, and permanently disregard and ignore the legal situation as authoritatively defined in the *dispositif* of the *Philippines v. China* Arbitral Award lies with the actual terms of any durable bilateral co-operation that the Philippines and China can establish in the future, and not just the evolving statements of political leaders. The Philippines and China can both internalize the Arbitral Award in any future bilateral provisional arrangements between them, or, in their participation collectively with all other South China Sea claimants in drafting the long-stalled ASEAN-China Code of Conduct on the South China Sea.<sup>71</sup> UNCLOS Articles 74(3) and 83(3) permit states that have not yet reached agreement on the delimitation of overlapping exclusive economic zones or continental shelves to “enter into provisional arrangements of a practical nature, and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”<sup>72</sup> These provisional arrangements must not change the marine environment or cause any change in the permanent character of disputed areas, and the provisional arrangements must be made such as to still enable future negotiations in good faith between all claimants to the dispute.<sup>73</sup> The clarifications declared in the *Philippines v. China* Arbitral Award *dispositif* can usefully foreground the terms of any co-operative, bilateral, and provisional arrangements that the Philippines and China may reach on joint marine resource management, joint hydrocarbon exploration and development,<sup>74</sup> shared fishing rights at Scarborough Shoal (as a matter of actual intergovernmental treaty or agreement, and not simply through equivocal state practice where China “allows”<sup>75</sup> the return of Philippine fishermen), and any specific MRAs<sup>76</sup> applicable to the two countries.

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70. Julian KU and Chris MIRASOLA, “Tracking China’s Compliance with the South China Sea Arbitral Award” *Lawfare* (3 October 2016), online: Lawfare <<https://www.lawfareblog.com/tracking-chinas-compliance-south-china-sea-arbitral-award>>.
71. Kristin HUANG, “China and ASEAN Agree on Draft Code of Conduct for South China Sea, Says Beijing’s Top Envoy” *CNBC* (8 March 2017), online: CNBC <<http://www.cnbc.com/2017/03/08/china-and-asean-agree-on-draft-code-of-conduct-for-south-china-sea-says-beijings-top-envoy.html>>.
72. UNCLOS, *supra* note 24 at arts. 74(3), 83(3). See Kamal HOSSAIN, “United Nations Convention on the Law of the Sea and Provisional Arrangements Relating to Activities in Disputed Maritime Areas” in Lilian CASTILLO, ed., *Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea Liber Amicorum Judge Caminos* (Leiden: Martinus Nijhoff, 2015), 674.
73. See *Aegean Sea Continental Shelf, Interim Protection*, Order [1976] I.C.J. Rep. 1976, 11 September 1976, at paras. 29–31; *Guyana v. Suriname*, Arbitration Award of 17 September 2007, at paras. 459–70; *Land and Maritime Boundary Between Cameroon and Nigeria*, Provisional Measures, Order [1996] I.C.J. Rep. 1996, 15 March 1996, at paras. 42–5.
74. Robert BECKMAN, “The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea” (2013) 107 *American Journal of International Law* 142 at 158–60.
75. “Xi Tells Duterte that Scarborough Shoal Will Stay Open to Philippine Fishermen” *South China Morning Post* (20 November 2016), online: South China Morning Post <<http://www.scmp.com/news/china/diplomacy-defence/article/2047747/xi-tells-duterte-scarborough-shoal-will-stay-open>>.
76. On mutual restraint arrangements, see SUN Pyo KIM, *Maritime Delimitation and Interim Arrangements in North East Asia* (Leiden: Martinus Nijhoff, 2004) at 36–42.

#### IV. CONCLUSION: *PHILIPPINES V. CHINA* ARBITRAL AWARD AS AN ENDURING SOURCE OF LAW

Can international court judgments and international arbitral awards lose their binding quality as a subsidiary source of international law,<sup>77</sup> when one or both States Parties to these cases assert, at any given point in time, that they will decline to give force to these judgments or awards? While it may be argued that the Philippines' recent varying positions could amount to some form of acquiescence with China's legal positions on the questions resolved in the *Philippines v. China* arbitration, it must be remembered that acquiescence only operates "where the vindication of a claim or course of action depends on the consent of the States affected".<sup>78</sup> The Tribunal's clarification of the status of China's nine-dash line map and its compatibility with maritime limits prescribed in UNCLOS, its legal characterization of certain geographical features in relation to UNCLOS Article 121, and the inconsistency of the corpus of China's law enforcement and island-building activities in the South China Sea with various provisions of UNCLOS and related maritime conventions, are all issues the vindication of which do not depend on the consent of either the Philippines or China. The law governing these questions as between both parties, as articulated authoritatively in the *Philippines v. China* Arbitral Award, remains regardless of either state's present or future inclination to "seek enforcement" of the Award now or to voluntarily "comply" with the Award later. Barring famous rare instances of non-compliance with the judgments of the ICJ,<sup>79</sup> there is a greater preponderance of state compliance with international decisions over time,<sup>80</sup> with non-compliance often being "slight"<sup>81</sup> rather than egregious. The actual track record of Philippine "enforcement", vis-à-vis China's "compliance", with the landmark *Philippines v. China* Arbitral Award of 12 July 2016 has barely begun.

77. Statute of the International Court of Justice, art. 38(1)(d). See also Hugh THIRLWAY, *The Sources of International Law* (Oxford: Oxford University Press, 2014) at 120–8; Christine GRAY and Benedict KINGSBURY, "Inter-State Arbitration since 1945: Overview and Evaluation" in Mark W. JANIS, ed., *International Courts for the Twenty-First Century* (Leiden: Martinus Nijhoff, 1992), 55 at 58–60.

78. Ian C. MCGIBBON, "The Scope of Acquiescence in International Law" (1954) 31 *British Yearbook of International Law* 143 at 143.

79. Philippe COUVREUR, "The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes" in A.S. MULLER, S. RAIC, and J.M. THURANZSKY, eds., *The International Court of Justice: Its Future Role after Fifty Years* (The Hague: Kluwer Law International, 1997).

80. On the substantial and imperfect compliance by states with decisions of the IC, see Aloysius P. LLAMZON, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice" (2008) 18 *European Journal of International Law* 815.

81. Heather L. JONES, "Why Comply? An Analysis of Trends in Compliance with International Judgments since Nicaragua" (2012) 12 *Chicago-Kent Journal of International Law* 58 at 58. See also Constanze SCHULTE, *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press, 2004) at Part III.